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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No.

BEATRICE LOWREY, et al.,

Petitioners,

vs.

EDWARD and THEODORE MALKOWSKI, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

To the Honorable Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioners Beatrice Lowrey, et al, pray that a writ of certiorari issue to review a decision of the Supreme Court of Illinois, which affirmed a decision of the Appellate court of Illinois, First District, which had affirmed in part and reversed in part a decision of the Circuit Court of Cook County, Illinois.

OPINIONS BELOW AND JURISDICTION.

The decision of the Supreme Court of Illinois was rendered Sept. 29, 1960, becoming final November 30, 1960, when petition for rehearing was denied, reported in 20 Ill. 2d 280, 170 N.E. 2d 147. Appellate decision became final December 25, 1959, reported in 23 Ill. App. 2d 371, 163 N.E. 2d 528. Jurisdiction is invoked pursuant to Title 28, sec 2101 (c) and rule 19, Supreme Court. Petitioners submit there are violations of the due process clause of the 5th Amendment, in that minors as well as the adult-plaintiff, have been deprived of property rights, i.e., the right to sue, or, being deprived of property without due process. Three different federal courts have passed on dram shop actions, both common-law and statutory, as will be shown below, all differently, and, therefore this court ought to settle same as can be, particularly those questions of basic human rights involving due process. Also, these opinions of the Appellate and Supreme Courts differ, and, neither ruled on the question of individual rights to maximum recovery, instead of group-plaintiffs maximum recovery, under the Dram Shop Act.

QUESTIONS TO BE REVIEWED.

(a) Whether a state limitation of 1-year right of action applies to a minor, who is prevented from suing after the 1-year although still a minor, depriving him of protection of due process.

(b) Whether a state holding that it is necessary that support and maintenance had in fact been provided by the support-provider before an action for such loss of support can stand; or whether it results in deprivation of property-rights without due process, and against public policy, when such right of action is denied, because the legal provider of support fails and refuses to so do.

(c) Whether the holding in the *Waynick* case gives rights of action in the cases here, notwithstanding these Appellate and Supreme court decisions.

(d) Whether this court has the right to rule on the problem of individual rights to maximum recovery under the Illinois Dram Shop Act, instead of being restricted to one maximum group-recovery, on the ground of deprivation of due process under the 5th Amendment, even though neither the Appellate nor Supreme courts ruled thereon.

Illinois Dram Shop Statute.

It is Chapter 43, Ill. Revised Statutes. Sec. 135 refers to injuries, death, loss of support, 1-yr. limitation period, amount of recovery, etc., they being more fully set out in the above court opinions, on pages 18, 22 of this petition. Sec. 131 prohibits the sale of intoxicating liquor to any intoxicated person.

STATEMENT OF THE CASE.

These are dram shop suits, for failure to support, brought by Beatrice Lowrey, for herself and two minor children against the defendant dram shops. Complaint was filed in the Circuit Court of Cook County, Illinois, April 3, 1958, alleging she obtained a divorce from her then husband on the grounds of habitual drunkenness for at least two years preceding the filing of the divorce action. The decree of divorce was entered November 10, 1954. Thereafter on April 23, 1957, she obtained a judgment in sum of $1590.00, for accrued child support and fees, with alimony being reserved in the divorce decree. At no time has the said husband paid any support for the children, nor alimony for Beatrice, nor any costs or fees. She married Roger Lowrey on January 8, 1955, and after date of the money judgment he adopted the two minor children. The dram shop suit alleged further that during the former marriage, the then husband was gainfully employed at times, and except for his excessive drinking would have been fully capable of properly supporting plaintiff-former-wife and the children. It charged, further, that the said husband purchased or obtained by gift intoxicating liquors from the defendants, jointly and severally, resulting in his habitual drunkenness throughout such periods, all with fault on part of defendants.

No testimony was ever taken, all judgments were had on pleadings or briefs in courts of review. The Appellate Court held that the "action does not have to be for physical injuries to the provider of the support", but affirmed on the ground that the suit was filed after 1 year after the cause of action accrued, thus failing to comply with the

limitation period in the Dram Act, applying to the minors as well as to the adult plaintiff. That court held further that "means of support" means that the provider of the support did in fact so provide, and where as here no support had been at any time provided, the act was not complied with and there was no cause of action.

The Supreme Court affirmed as to the 1-year limitation, including the minors, indicating in its opinion that the causes of action accrued as far back as 1954, when the divorce on the grounds of habitual drunkenness was granted, and that such 1-year period of limitation commenced at least on that date. The opinion stated that as a matter of "public policy" a dram shop operator ought not to be held "perpetually" liable for the consequences of the sale of liquor. No reference was made to the "means of support" requirement of the Appellate court's opinion. Neither opinion ruled as to each individual being entitled to sue for the maximum, alone, distinguished from group-action.